United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4223-443

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4223, 75-4243

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

LOCAL 1199, DRUG AND HOSPITAL UNION,
RWDSU, AFL-CIO,

Intervenor,

v.

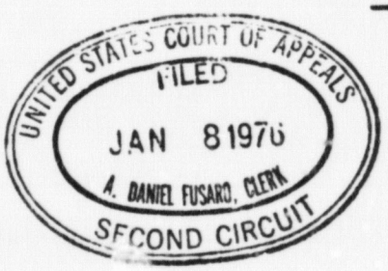
HENRY BOOK, WILLIAM RUSS AND ROBERT KLEIN,
d/b/a SPRAIN BROOK MANOR,

Respondent.

B
P/S

On Application for Enforcement
of an Order of The National
Labor Relations Board

BRIEF FOR LOCAL 1199, DRUG AND HOSPITAL UNION, RWDSU, AFL-CIO



SIPSER, WEINSTOCK, HARPER & DORN
Attorneys for Intervenor, Local 1199,
Drug and Hospital Union, RWDSU, AFL-CIO
380 Madison Avenue
New York, New York 10017

Of Counsel:

RICHARD DORN

3

INDEX

AUTHORITIES CITED

Cases: Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4223, 75-4243

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

LOCAL 1199, DRUG AND HOSPITAL UNION,
RWDSU, AFL-CIO,

Intervenor,

v.

HENRY BOOK, WILLIAM RUSS AND ROBERT KLEIN,
d/b/a SPRAIN BROOK MANOR,

Respondent.

On Application for Enforcement
of an Order of The National
Labor Relations Board

BRIEF FOR LOCAL 1199, DRUG AND HOSPITAL UNION, RWDSU, AFL-CIO

STATEMENT

This brief is filed by Intervenor, Local 1199, Drug and Hospital Union, RWDSU, AFL-CIO (hereinafter "Intervenor" or "Local 1199")* in support of the application by the National

---

* The name of the Intervenor was changed subsequent to the hearing to District 1199 National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO

Labor Relations Board (hereinafter "Board") for enforcement of its order against the Respondent.

The Intervenor relies on the statement of the issue and the statement of facts as set forth in the brief of the Board.

ARGUMENT

THE BOARD CORRECTLY FOUND THAT THE GENERAL COUNSEL MET HIS BURDEN OF ESTABLISHING THAT THE RESPONDENT VIOLATED THE ACT BY RECOGNIZING, AND SIGNING A CONTRACT WITH A MINORITY UNION.

In ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, the Court upheld a Board finding that an employer and union violated the Act when the employer recognized the union as the exclusive bargaining representative of certain of its employees, when the union did not in fact have the support of a majority, and this in spite of a bona fide and good faith belief by both the employer and the union that the latter did enjoy majority status.

The General Counsel, in the instant case, met his burden of establishing that Local 999, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (hereinafter "Local 999") lacked majority support by showing that 70 employees, a clear majority, did not sign authorization cards for Local 999. Thus the latter could not possibly have represented a majority

of the employees on the crucial dates. Since the cards were allegedly destroyed by Local 999, it is difficult to conceive what other evidence could have been presented by the General Counsel to meet his burden.

After the General Counsel made out a prima facie case that the majority of the employees did not authorize Local 999 to represent them, the burden was upon the Respondent to come forward with evidence to establish majority status. Failing that, a violation of the Act properly was found. See Ellery Products Manufacturing Co., Inc., 149 NLRB 1388; Rockville Nursing Center, 193 NLRB 959.

The Board has held that where employees sign cards for more than one union, those cards are not a reliable indication of the employees support for one of the unions to be their exclusive bargaining agent, even where the union was not aware of the existence of the other union. Allied Supermarkets Inc., 169 NLRB 927. A fortiori, where the employees themselves testified that they never signed authorization cards, a violation of the Act is established. In fact the Board has followed the same rule even where the results of a card check were certified by an impartial agency. Italco Aluminum Corp., 169 NLRB 1034, enf'd. 417 Fed.2d 36 (C.A. 9, 1969).

Therefore absent any other factors, it is clear that a violation of the Act was established. The Board was correct

in concluding that the Arbitrator's card check was not sufficient to overcome the General Counsel's prima facie case.

It is true of course that the Board has long had a policy of deferring to an arbitration award where the procedures were fair, all of the parties agreed to be bound, and the results were not repugnant to the Act. Spielberg Manufacturing Co., 112 NLRB 1080. And in Collyer Insulated Wire Co., 192 NLR3 837, the Board withheld its process pending an arbitrator's determination but "only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective bargaining agreement subject to arbitration". It is thus obvious that the Board's policy to defer to arbitration or to an award of an arbitrator is not applicable in this case where there was no grievance which arose under the terms of the collective bargaining agreement, and where the issue is the validity under the Act of the Respondent's recognition of Local 999 as the exclusive bargaining agent for its employees, which in turn depends on the latter's majority status. No employee appeared before the Arbitrator when he conducted the card count and thus the validity of the cards in the light of the employees' testimony before the Board manifestly was not considered by him. Under these circumstances the rights of the employees have been ignored and the Arbitrator's decision cannot be binding either upon them or the Board. See Scottex Corp., 200 NLRB 446.

The Board's policy does not require it to defer to an arbitration where the interests of the charging party are in apparent conflict with the interests of the parties to the arbitration. See Kansas Meat Packers, 198 NLRB No. 2, 80 LRRM 1843. "A finding that a harmony of interests exists which would warrant deferral also requires that the contracting party in question be willing to carry the dispute to arbitration and press the discriminatee's position in that proceeding". Seng Co., 205 NLRB 200, 201. See also Jack Watkins GMC, 203 NLRB 632.

There can be no question that the interests of Local 1199 and the employees are not in harmony with the interests of the Respondent and Local 999, and the issue in this case - the majority status of Local 999 - cannot be resolved via the traditional arbitration procedure which involves grievances arising under a collective bargaining agreement after a union's majority status has been settled.

This case did not involve a dispute over the meaning of contractual provisions. As the Board noted in National Radio Company, 198 NLRB No. 1, 80 LRRM 1718 ". . . once an exclusive agent has been chosen by employees to represent them . . . the Board may defer to arbitration where the parties have agreed to resolve disputes by that method". Such a situation did not exist in this case.

This Circuit has succinctly indicated why the Board

was correct in not deferring to the Arbitrator's card check:

> "The National Labor Relations Act guarantees certain rights to employees, employers, bargaining representatives, and the public, and the Board is charged with protecting these interests. An arbitrator is not. His function is to discern the intention of the parties to a contract, who have hired him to resolve their differences. The interests of third parties, such as an individual employee, a group of employees, or the public, are not his primary concern." NLRB v. Horn & Hardart Company, 439 Fed.2d 674 (C.A.2, 1971).

In Hunter Outdoor Products, Inc., 176 NLRB 449, enf'd. 440 Fed. 2d 876 (C.A. 1, 1971) the Board refused to defer to an arbitration award similar to the one in the instant case, as the arbitrator was not empowered to and did not look into the circumstances under which the cards were solicited and signed; he merely limited his investigation to a comparison of the signatures on the cards with the employees' signatures in the Employer's records. As the First Circuit in enforcing the order of the Board noted:

> "The National Labor Relations Act guarantees employees 'complete and unfettered freedom of choice' in the selection of a collective bargaining representative. . . . It would be anomalous if an employer could abrogate that right by contracting with a minority union to submit to binding arbitration."

Thus under the facts in this case the Board was

correct in finding a violation of the Act. For it to hold otherwise would have amounted to an open invitation to employers and unions to deprive employees of their precious right to select a bargaining representative of their own choice.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the Court should enforce the Board's order in full.

Respectfully submitted,

SIPSER, WEINSTOCK, HARPER & DORN
Attorneys for Intervenor,
Local 1199, Drug and Hospital
Union, RWDSU, AFL-CIO

Of Counsel:

RICHARD DORN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

LOCAL 1199, DRUG AND HOSPITAL UNION, RWDSU, AFL-CIO,

Nos. 75-4223, 75-4243

Intervenor,

v.

HENRY BOOK, WILLIAM RUSS AND ROBERT KLEIN, d/b/a SPRAIN BROOK MANOR,

Respondent.

- x

CERTIFICATE OF SERVICE

The undersigned certifies that each of the following counsel has this day been served with two (2) copies of the Intervenor's brief in the above-captioned case by first class mail at the addresses listed below:

General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Horowitz & Schwartz
Attn.: Burton H. Horowitz, Esq.
715 Park Avenue
East Orange, New Jersey 07017

Edward Halpern, Esq.
Halpern & Shortlander
422 Rte. 206 South
Somerville, New Jersey.

Dated: New York, New York
January 7, 1976

Richard Dorn

Richard Dorn
Sipser, Weinstock, Harper & Dorn
Attorneys for Intervenor